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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 17

ALEXANDER BOYD,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,

Respondents.

BRIEF ON BEHALF OF PETITIONER.

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INDEX.

Appendix: PAGE

Complaint, Boyd v. Grand Trust Western R. Co. filed in Superior Court of Cook County, Illinois .. 27

Argument 10

A. The liability created by the Federal Employers' Liability Act is the composite of all of its provisions and Section 5 protects every element of that liability 10

B. Contracts made after the cause of action accrues are void under Section 5 17

C. The Michigan Court decided the main question contrary to controlling federal decisions 19

D. The Contracts are invalid 20

E. The judgment of the lower state court should be affirmed 25

Conclusion 26

Contracts Involved 5-6

Jurisdiction 2

Opinion Below 2

Questions Presented 4

Specification of Errors to be urged 7

Statement of the case 5

Statutes Involved 3-4

Summary of Argument 7-9

Citations.

Cases:

Akerly v. New York Central R.R., 73 F. Supp. 903 .. 3
Akerly v. New York Central R. Co., 168, F. (2nd) 812 ..... 3, 7, 19
Baltimore & O. R. Co. v. Kepner, 314 U. S. 44 19
Clark v. Lowden, 48 F. Supp. 261 3
Detwiler v. Chicago, R. I. & P. Ry., 15 F. Supp. 541 .. 3
Detwiler v. Lowden, 198 Minn., 185 3
Duncan v. Thompson, 315 U. S. 1 ..... 2, 8, 16, 17
Fleming v. Husted, 68 F. Supp. 900 2
Herrington v. Thompson, 61 F. Supp. 903 ..... 3, 23
Krenger v. Penn. R. Co., 8 FRD 65 ..... 2, 23
Krenger v. Penn R. Co., 174 F. (2nd) 556 ..... 2, 23
Peterson v. Ogden Union etc. Co., (Utah) 175 Pac. (2nd) 744 ..... 2, 20
Porter v. Fleming, 74 F. Supp. 378 2
Roland v. A. T. & S. Fe Ry., 65 F. Supp. 630 3
St. Louis, Iron Mt. & S. R. Co. v. Taylor, 210 U. S. 281 12
Sherman v. Pere Marquette Ry., 62 F. Supp. 590 ... 2, 21
Towne v. Kisner, 245 U. S. 418, 425 16
Tiller v. Atl. Coast Line R. Co., 318 U. S. 54 10

Statutes:

34 Stat. 232 14
35 Stat. 65, 45 U.S.C.A., Secs. 51-60 ..... 2, 4, 6
35 Stat. 66, 45 U.S.C.A., Sec. 55 ..... 2, 4
36 Stat. 291, 45 U.S.C.A., Sec. 56 ..... 4, 11, 13
36 Stat. 291, 45 U.S.C.A., Secs. 56-59 ..... 11, 17
New Title 28 U.S.C., Judiciary and Judicial Procedure, Secs. 1257 ..... 2, 3
45 U.S.C.A., Secs. 1-16 6
53 Stat. 1404, 45 U.S.C.A., Sec. 60 ..... 10, 12

Miscellaneous:

42 Cong. Rec. 4427 10
45 Cong. Rec. 2253 13
45 Cong. Rec. 4041 11
53 C. J. S. Liability, Page 16 16
Senate Report, No. 422 11

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STATEMENT.

Respondent contends in its brief in opposition to the petition that this cause has become moot. Its contention is based upon the fact that a second suit was filed subsequent to the decision by the Supreme Court of Michigan in a Federal Court at Detroit, Michigan.

Petitioner's reply filed in this court, we believe fully answers respondent's contention in this respect.

It is of course true that this court or any other court will not pass upon moot questions. But a cause or a question does not become moot so long as the primary issues remain unsettled. In the case at bar the primary object of the

controversy and the primary issues involved have all of their original vitality. This is so obvious that we shall omit any further reference to the matter.

I.

OPINION BELOW.

Grand Trunk Western R. Co. v. *Boyd*, 321 Mich. 693, 33 N. W. (2d) 120. (R. 52)

II.

JURISDICTIONAL GROUNDS.

The jurisdiction of this Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1257.

The Supreme Court of Michigan has rendered a final judgment interpreting Section 5 of The Federal Employers' Liability Act, 35 Stat. 66 (45 U. S. C. A., Section 55) in a manner probably not in accord with this Court's decision in *Duncan* v. *Thompson*, 315 U. S. 1 and contrary to a decision of the United States Court of Appeals, Sixth Circuit in *Akerly* v. *New York Central R. Co.*, 168 F. (2d) 812.

There is a great divergence of judicial opinion[1] as to

[1] The cases in which courts have held such contracts as those here involved, invalid, are:

Sherman v. *Pere Marquette R. Co.*, 62 F. Supp. 590 (1945).
Peterson v. *Ogden Union Ry. & Depot Co.*, 175 Pac. (2d) 744 (1946).
Fleming v. *Husted*, 68 F. Supp. 900 (1946).
Porter v. *Fleming*, 74 F. Supp. 378 (1947).
Krenger v. *Penn. R. Co.*, 8 F. R. D. 65 (1947).
Akerly v. *New York Central R. Co.*, 168 F. (2d) 812 (1948).

The *Krenger* case was affirmed in *Krenger* v. *Pennsylvania R. Co.*, 174 F. (2d) 556 (1949).

the interpretation of Section 5 on the question here presented, and it is of fundamental importance in the administration of the Federal Employers' Liability Act that this Court exercise its supervisory power to resolve the question and finally determine the full scope of the words "Any Liability created by this chapter," as used in that provision. *Duncan* v. *Thompson*, 315 U. S. 1, 5, 62 Sct. 422, 423.

Statutes Involved.

1.

28 United States Code, Section 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari, • • • where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The courts in these cases rely, in the main, on *Duncan* v. *Thompson*, 315 U. S. 1 (1942).

This court, in the *Duncan* case held that the words "any contract" in Section 5 included contracts made after the cause of action arose as well as those made before. The courts holding such contracts valid have, in the main, overlooked this point in the case.

This court held that the contract in the *Duncan* case was invalid. For the reason that the effect of the contract there involved was to deprive the injured man of the right to sue at all until he had repaid the amount advanced to him, the courts holding the contracts valid, have sought to distinguish the *Duncan* case from the cases involving contracts to sue only in particular courts or at particular places.

The cases in which such courts have held such contracts valid are:

Detwiler v. *Chicago R. I. & P. R. Co.*, 15 F. Supp. 541 (1936).
Detwiler v. *Lowden*, 198 Minn. 185 (1936).
Clark v. *Lowden*, 48 F. Supp. 261 (1942).
Herrington v. *Thompson*, 61 F. Supp. 903 (1945).
Roland v. *A. T. & S. F. Ry. Co.*, 65 F. Supp. 630 (1946).
Akerly v. *N. Y. C. R. Co.*, 73 F. Supp. 903 (1947).

The *Akerly* case was reversed in *Akerly* v. *N. Y. C. R. Co.*, 168 F. (2d) 812 (1948).

2.

Section 5, 35 Stat. 66 (45 U. S. C. A., Section 55):

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void:
> • • •

3.

Section 6, 36 Stat. 291 (45 U. S. C. A., Section 56):

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. Apr. 22, 1908, c. 149, 6, 35 Stat. 66; Apr. 5, 1910, c. 143, 1, 36 Stat. 291; Mar. 3, 1911, c. 231, 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, 2, 52 Stat. 1404.

III.

Question Presented.

The sole question presented is:

> Whether the contracts entered into on December 5th and 21st, 1947 were invalid under Section 5, 35 Stat. 66 (45 U. S. C. A., Section 55) for the reason that they enabled the defendant to escape a liability created by Section 6, 36 Stat. 291 (45 U. S. C. A., Sec. 56).

This question involves the determination of the meaning and scope of the words "Any Liability created by this Chapter," as used by Congress in Section 5.

IV.

STATEMENT OF THE CASE.

On or about November 23, 1946, at about 7:30 P. M. petitioner was injured while pulling an operating lever on a railroad car, while employed by respondent as a yard brakeman, in its Nichols Yards at Battle Creek, Michigan. The knuckle lock disconnected, when Petitioner pulled the lever, causing Petitioner to lose his balance and fall to the ground (R. 18).

On or about December 5th, 1946, Petitioner while still disabled on account of his injuries, told Respondent that he was without funds for living expenses and requested an advance of funds from Respondent to be used for that purpose (R. 18).

Respondent, on that date, advanced to Petitioner the sum of Fifty dollars (R. 18) but required Petitioner, in consideration of such advancement, to sign one of the contracts here in question (R. 25-26).

On December 21, 1946, Petitioner made a similar request for funds for the same purpose and Respondent advanced to him the further sum of Fifty Dollars (R. 19). Petitioner was also required on that occasion to sign another contract, identical with the first (R. 19, 26-27).

The material portion of these identical contracts, was (R. 25-26).

> 1. That I will endeavor in good faith to settle any claim I may have for my said injuries.
>
> 2. If my said claim cannot be settled to my satisfaction and should I wish to start suit against said Grand Trunk Western Railroad Company to recover damages for my said injuries, that any such suit shall be commenced within the county or district where I resided at the time my injuries were sustained or in

the county or district where my injuries were sustained and not elsewhere.

3. That all sums of money now or hereafter advanced to me by said Railroad Company shall be deducted from any sum which shall finally be paid to me by said Railroad Company, either in settlement or as a satisfaction of judgment, or otherwise, on account of said injuries.

Petitioner filed suit in the Superior Court of Cook County, Illinois, June 25th, 1947 (R. 19) under the Federal Employers' Liability Act, Sections 51-60 and the Federal Safety Appliance Acts, Sections 1-16, (R. 5, 39; Appendix, page 27).

Respondent filed its complaint in Chancery in the Circuit Court of Calhoun County, Michigan, July 17th, 1947, praying that Petitioner be restrained from prosecuting his suit in Cook County, Illinois and for other relief (R. 23). It set up the contracts as the basis for the relief sought, supplemented by charges of inconvenience and expense (R. 17-24).

The trial court entered a temporary restraining order. Plaintiff moved to dissolve the temporary injunction on the grounds that the contracts were invalid under Section 5, 35 Stat. 66 (45 U. S. C. A., Sec. 55) and to dismiss the suit (R. 34). This motion was allowed (R. 37-47).

Respondent appealed to the Supreme Court of Michigan where the judgment of the trial court was reversed (June 29th, 1948 (R. 52-57). Petitioner's application for a rehearing was denied October 4th, 1948 (R. 92). That Court granted a stay of mandate pending petition for writ of certiorari to be filed in this Court (R. 97).

V.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Michigan erred:

1. In holding that the words "any liability created by this chapter" as used in Section 5, relates only to liability to respond in damages under Section 1, 35 Stat. 65 (45 U. S. C. A., Section 51) (R. 55).

2. In holding that Section 5 does not prohibit such contracts when made after the cause of action arises (R. 55).

3. In refusing to be bound by the decision of the United States Court of Appeals in *Akerly* v. *New York Central R. Co.*, 168 F. (2d) 812, decided June 14th 1948 and prior to the Michigan Court's decision in the instant case (R. 68-75).

4. In holding that the contracts were valid under Section 5 and were legal and binding upon Petitioner (R. 56).

5. In reversing instead of affirming the judgment of the Circuit Court of Calhoun County, Michigan; entering a decree restoring the temporary injunction, as granted by the lower court and remanding the cause for further proceedings (R. 56).

VI.

SUMMARY OF THE ARGUMENT.

A.

The primary purpose of Congress in enacting the Federal Employers' Liability Act was not to create liability to respond in damages. Liability in that sense, already existed as a result of the common law right of action in which the railroad man could sue to recover for wrongful injuries. Congress merely took that common law right of action and pruned away what were considered to be its injustices.

In each successive amendment of the law down to and including the 1939 amendment, Congress has adhered to that dominant purpose of removing unjust rules and practices at the common law.

The words "any liability created by this chapter" is not the same as saying "any liability created by Section 1 of the Act". Congress, in the enactment of the law created a new liability and substituted it for the existing liability at the common law. That new liability is the composite of all of the separate provisions of the Act. If one element of that liability can be destroyed, all can be destroyed. The successive destruction by such a contract of the elements of that liability, would, like the successive pulling down of the pillars of a temple, destroy the entire structure, erected by Congress and strengthened and perfected by amendments over the period of forty years that have elapsed since the law was passed.

One of the vital elements of that liability is the right of the railroad man to select the forum in which to bring his suit, as provided in Section 6. The comprehensive language of Section 5 outlaws any contract, the effect of which is to destroy the right to freely choose such a forum, and it is void under that provision.

The contracts here fall within the prohibition of Section 5.

B.

The Michigan Court erred in holding contrary to this Court's decision in *Duncan* v. *Thompson*, 315 U. S. 1, that contracts made after a cause of action accrues are valid.

C.

The Michigan Court erred in refusing to follow controlling decisions of the Federal Courts, holding that the venue provision of the Act is an inherent part of the employers liability.

D.

The court's holding that such contracts as the ones here involved, are supported by the better reasoning.

E.

The history of the legislation reveals that Congress used its powers under the Constitution to the fullest extent in the effort to protect the railroad man from the unjust rules and practices of the common law right of action, to place him upon an equal footing with his powerful employer and to remove preventable hazards from operative railroading.

The current injustice which received the most studied notice was that sought to be removed by Section 5. The Michigan lower Court correctly held that the contracts here were void under that provision. For reasons discussed in the brief, the Supreme Court of Michigan erred when it reversed that judgment.

VII.

ARGUMENT.

A.

The liability created by the Federal Employers' Liability Act is the composite of all of its provisions and Section 5 protects every element of that liability.

It was not the primary purpose of Congress in enacting the Federal Employers' Liability Act to create liability to respond in damages. Liability in that sense, already existed as a result of the common law right of action in which the railroad man could sue to recover for wrongful injuries. Congress merely took that common law right of action and pruned away what were considered to be its injustices.

Congressman Sterling, in charge of the original bill HR 20310 in the 60th Congress, in presenting it to the House described it, not in terms of liability, but in terms of the injustices removed (42 Cong. Rec. 4427):

> The first two sections of the bill abolish the doctrine of fellow servant in this line of commerce.
>
> • • •
>
> Section 3 is a modification of the common law doctrine of contributory negligence.
>
> • • •
>
> The provision in Sections 3 and 4 provides that contributory negligence and assumpiton of risk shall not be charged to the employee, where he is injured by reason of the violation of any statute by the employer that has been enacted for the safety of employees.[2]
>
> • • •

[2] The 1939 amendment to the Act abolished every vestige of the assumption of risk doctrine in these cases where injuries were due in whole or in part to the negligence of any of the officers, agents, or employees of the carrier, 53 Stat. 1404, *Tiller v. Atlantic Coast Line*, 318 U. S. 54.

> Section 5 of the bill provides that all contracts, rules and regulations which seek to exempt the employer, the common carrier, from (any) liability created by this act shall be void so far as it seeks to produce that exemption.

This primary purpose of Congress to shield injured railroad men and their families from these common law rules and practices that were deemed unjust, shaped, not only the original Act of 1908, but each succeeding amendment of that act.

The original act left the vital question of venue to be controlled by the general federal venue provisions which required suit under the act to be brought in the district of which the defendant was an inhabitant. The injustice of this requirement was removed by the 1910 amendment which added Sections 6 through 9 to the original act[3].

For the reason that the good faith of Congress in passing the original Act in 1908 had been questioned by counsel for the railroads in the Mondou and Hoxie cases (223 U. S. 1 and 82 Conn. 352), the Senate Report, No. 422, accompanying the Amendment, proclaimed the purpose of the legislation as follows (45 Cong. Rec. 4041):

> This subject is referred to here only for the purpose of calling upon Congress to make entirely manifest the good faith of the legislature in the enactment of the employers' liability law, which places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. The total casualties to trainmen on the interstate railroads of the United States for the year 1908 was 281,645.
>
> It was the intention of Congress in the enactment of this law originally and it may be presumed to be the

[3] 36 Stat. 291, 45 U. S. C. A., Sections 56-59.

intention of the present Congress, to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in the Taylor Case (210 U. S. 281), "measurably control their causes".

The passage of the original act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as congressional power can extend, those rules of the common law which the president, in a recent speech at Chicago, September 16, 1909, characterized as "unjust". President Taft in his address at Chicago September 16, 1909 referred to the continuance of unjust rules of law exempting employers from liability for accidents to laborers.

This public policy which we now declare is based upon the failure of the common-law rules as to liability for accident, to meet the modern industrial conditions and is based not alone upon the failure of those rules in the United States, but their failure in other countries as well.

• • •

The passage of the law was urged upon the strongest and highest considerations of justice and promotion of the public welfare. It was largely influenced by the strong message of President Roosevelt to the Sixtieth Congress in December, 1907, in which the basis of the legislation was clearly and strongly placed upon the ground of justice to the railroad workmen of this country and in which legislation was urged to the limit of congressional power upon this subject.

The 1939 amendment to the act, added Section 10, 53 Stat. 1404, 45 U. S. C. A., Section 60. That provision, on its face, so clearly exemplifies this declaration of policy and so clearly establishes it as a continuing policy down to this date, that it will bear quoting here:

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing, voluntarily, information to a person in interest as to the facts incident to the injury or death of any

> employee shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, that nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

That Congress while concerned about injustices to the employee was not unmindful of justice to the carriers, appears from the *proviso* to this section. That fact also appears from the rejection by Congress in 1910 of a proposed venue provision which would have permitted suit in the district "in which the defendant shall be found at the time of commencing the action" (45 Cong. Rec. 2253). This was changed in the provision adopted, to suit in the district "in which the defendant shall be doing business at the time of commencing such action". 36 Stat. 291, 45 U. S. C. A., Section 56.

It must be noted, also, that by the *proviso* in Section 10, certain contracts were excepted from its all inclusive coverage and that Section 5 contains no such exception.

It is Petitioner's contention that "any liability created by this chapter" means just what it says and that the comprehensive language of Section 5 was deliberately chosen by Congress to preserve the status of the employee at the level fixed by the aggregate of the Act's provisions. The status given to him by the Act in its entirety, was designed to place him as nearly as possible on an equal footing with his powerful employer in the matter of claims

for injuries or death arising out of his employment, as a result of the employer's negligence, both in bargaining for settlement and in securing a judgment in court, where suit became necessary. It was intended by Congress that that position of equality should not be bartered away, either altogether or in piecemeal, by the employee in a moment of dire necessity, as Petitioner was induced to do in this case. The powerful employer must know that when it attempts to induce the necessitous employee to forego any of the privileges or immunities given to him in the Act, for some temporary advantage, such as Fifty Dollars or One Hundred Dollars or any amount of money, with which to purchase the necessities of life, while recovering from his injuries, it bargains with the employee, armored with every protecting provision of the Act.

The privilege of selecting a forum at any place where his employer is carrying on its business is one of those protecting provisions and comes within the meaning of the words "any liability created by this chapter."

In the light of the obvious and declared policy of Congress, this intention on the part of Congress is indisputably shown by the legislative history of Section 5.

When the original bill introduced in the House in 1908 reached the Senate, a substitute bill was there introduced. Included in the substitute bill was a provision offered as a substitute for Section 5 of the House bill. The substitute was lifted from the first Employers' Liability Act, passed in 1906, and was identical with Section 3 of the 1906 Act. That Section, 34 Stat. 232, was as follows:

> That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar

> or defense to any action brought to recover damages for personal injuries to or death of such employee.

If Congress merely desired to prohibit contracts enabling the carrier to exempt itself from liability to respond in damages, the foregoing provision would have been ample for that purpose. Its rejection as a substitute for Section 5 indicates that Congress wanted to protect the employee against contracts that would permit the employer to escape liability through pleading or practicing *any* of the defenses outlawed by the Act. The language of the provision adopted:

> *Any contract* • • • the purpose or intent of which shall be to enable *any carrier* to exempt itself from *any liability created by this chapter*, shall, to that extent, be void (Italics ours);

is comprehensive enough to protect every right or privilege given to the employee and to prevent the carrier from restoring to itself by contract any defense or practice formerly available to it, under the rules of the common law. The rejection of the old provision and the adoption of the new one, in the light of the background and history of the law and the enactment of the law itself would seem to lead inevitably to the conclusion that this was the intention of Congress. "Any liability created by this Chapter" is not the same as saying "any liability created by Section 1". Congress in the enactment of the law, created a new liability and substituted it for the existing liability at the common law. That new liability is the composite of all of the separate provisions of the Act. If one element of that liability can be destroyed, all can be destroyed. The successive destruction by such a contract of the elements of that liability, would, like the successive pulling down of the pillars of a temple, destroy the entire structure erected by Congress and strengthened and perfected by amendments

over the period of forty years that have elapsed since the law was passed.

This court in *Duncan* v. *Thompson*, 315 U. S. 1, 62 Sct. 422, appears to have come to that conclusion, when it said (Page 6):

> "Because the various state measures directed against contractual arrangements intended to exempt employers from liability were thus laid before Congress, the rejection of the restrictive language of Section 3 of the old act indicates a deliberate abandonment of the limitation of that section. And the adoption of Section 5 of the present act without adding any of the other limitations which some of the state statutes had embodied, argues persuasively that Congress wanted Section 5 to have *the full effect that its comprehensive phraseology implies.*" (Italics ours).)

Section 10 with its *proviso* excepting certain contracts from the same comprehensive language, "Any contract, rule, regulation or device whatsoever," as used in Section 5, argues just as persuasively, that "Any liability created by this chapter" may not be hedged about by exceptions not found in the Act itself.

The full effect of the comprehensive phraseology of the section cannot be determined by lifting the single word "liability" from its context and going either to the legist or to the lexicographer for its meaning.

In the first place the word taken alone may have a score of meanings, depending upon the setting and the circumstances in which it is used.[4] As Mr. Justice Holmes said:[5]

> "A word is not a crystal transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

[4] 53 C. J. S. Liability, page 16.
[5] *Towne* v. *Eisner*, 245 U. S. 418, 425.

In the second place the "circumstances" and the "time" and the "setting" in which the word is used in Section 5, leave no room for going afield in any attempt to define the word itself. "*Any liability created by this chapter,*" directs the attention to the Act itself; to its phraseology, to the reasons for its enactment and to the purposes it was designed to achieve, not for a definition of the word itself, but for the meaning of the phrase of which it is a part. These sources furnish its color and content, even though, when its obvious meaning is determined, it might be said that Congress might have used another word which would have more certainly expressed its intention. Yet it is difficult, indeed, impossible, in view of the importance of the many safeguards with which Congress sought to protect the employees right of action against *injustices*, to find a better word. Certainly "provisions" instead of "liability" as indicated by the Michigan Supreme Court (R. 39) would not have been apt, for some of the later provisions do not pretend to fix any new duty or obligation or responsibility or burden upon the carrier—Sections 7 and 8 for illustrations.[6]

B.

Contracts made after the Cause of Action accrues are void under Section 5.

This Court held in *Duncan* v. *Thompson*, 315 U. S. 1, 5, said:

> Without more the change from "contract" to "any contract, rule, regulation or device whatsoever" would seem to be an enlargement ample to include agreements made after the event of injury.

---

[6] 36 Stat. 291, 45 U. S. C. A. Sections 57, 58.

The Court found "more" (Page 6) and held that Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies.

The Supreme Court of Michigan disregarded this point in the Duncan case and said (R. 55):

> There are reasons why Congress should interest itself in prohibiting contracts requiring employees to waive such liability as a condition of employment, but there is no apparent reason why Congress would interest itself in prohibiting a fair and reasonable contract made without fraud after a cause of action has accrued.

The Michigan Court thus ruled on a federal right and erred in refusing to follow the federal rule announced by this court.

This Court in the Duncan case construed the words "Any Contract" in its context to be all inclusive. Congress in the language used left no occasion to distinguish between a "fair and reasonable contract made without fraud after a cause of action has accrued" and one that is unfair and unreasonable and fraudulent. To make such a distinction would be to amend the law and would amount to judicial legislation.

Moreover, this Court held in the Duncan case that Congress made no distinction between contracts made before and contracts made subsequent to the accrual of a cause of action. The cases relied upon by the Michigan Court holding that Section 5 applies to contracts made before but not after the cause of action has accrued do not even suggest that any distinction between fair and unfair contracts is to be made where they are made before the cause of action arises. "Any Contract" in Section 5 which applies in both instances under the Duncan case is just as all inclusive in the one instance as in the other.

C.

The Michigan Court decided the main questions Contrary to controlling Federal decisions.

The United States Court of Appeals, Sixth Circuit, in *Akerly* v. *New York Central Railroad Company*, 168 F (2nd) 812, decided prior to the decision in the instant case, held identical contracts to be invalid under Section 5. The Court, after citing the Duncan case, said (Page 815):

> We think the inclusion of this section in the Employers' Liability Act, with its creation of new obligations against the employer, makes the venue provision an inherent part of the employers liability. An attempt to limit it by contract is an attempt to exempt the railroad from liability and is void.

This case was decided June 14th, 1948 (R. 68). The Michigan Court decided the case at bar June 29th, 1948 (R. 57). The Akerly decision was called to the court's attention in the Application for Rehearing (R. 64, 68) filed July 17th, 1948 (R. 59).

The correct answer to the question before the court depended upon the construction of a federal statute. This court said in *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, 62 Sct. 6, 10, that in such a case:

> Consequently the action of a state court must be in accord with the federal statute and the federal rule as to its application rather than state statute, rule or policy.

The Court thus refused to follow the decision of this Court in the Duncan case; that of the United States Court of Appeals in the *Akerly* case and numerous other Federal District Courts and State Courts. Instead it followed the line of cases that, for the most part, held to the theory that only conracts made before the accrual of the cause of action are void under Section 5 (R. 55).

The Court erred in its refusal to follow the federal rule and in failing to grant Petitioner's application for a rehearing when that rule as announced by the United States Court of Appeals for the Sixth Circuit, which embraces the State of Michigan was called to its attention.

D.

The Contracts are Invalid.

Other State and Federal Courts have held such contracts invalid.

In *Peterson* v. *Ogden Union Railway and Depot Co.*, 175 Pac. (2nd) 744, (1946) the Supreme Court of Utah in denying validity to the contract there involved, pointed out the comprehensive nature of Section 55 and the real purpose of Section 56.

After the accident, but before suit was brought, the Company advanced the injured employee $500.00 on account of his injuries and required him to sign an agreement that in case a final settlement could not be reached, he would not bring suit in any jurisdiction outside of the District Court of the United States, Northern Division, of Utah.

Suit was filed in a State Court. Before trial on the merits of the case, the trial court, on motion of the company, dismissed the action on the ground that the contract was binding on Peterson. He appealed and the Supreme Court in reversing the judgment of the trial court, said:

> "It is apparent that Congress by the use of the very broad terms of Section 5 intended to protect fully the rights given employees by the Chapter. The section says 'any' device whatsoever the purpose or intent of which shall be to enable the carrier to exempt itself from 'any' liability created by the chapter, shall to that extent be void. The Supreme Court of the United States in *Duncan* v. *Thompson*, Jan., 1942, 315 U. S. 1,

62 S. Ct. 422, 86 L. Ed. 565 held the section applied to contracts made after the cause of action arose as well as those made before. Regardless of the intention of the parties if the practical effect of the contract or device is to exempt the carrier from any liability imposed by the chapter, the contract or device is void. *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 32 S. Ct. 589, 56 L. Ed. 911; *McAdow v. Kansas City Western R. Co.*, 100 Kan. 309, 164 P. 177, L. R. A., 1917 E., 539; *Larson v. Lewis-Simas-Jones Co.*, 29 Cal. App. 2d 83, 84, P. 2nd 296.

• • •

"Section 6 makes available to the plaintiff several courts in which he may bring the action. Clearly that section gives the employee substantial benefits. It was not only for his convenience and to enable him to choose a court where the expense of litigation would not be prohibitive, but was to give him the right to select the courts in which he considers it would be most advantageous for him to bring his action.

• • •

"The defendant contends that the plaintiff exercised his right to choose the court in which to bring his action by entering into the contract, and, inasmuch as the plaintiff had the right to choose and exercised that right by choosing the federal court, Sections 5 and 6 of the Act are not contravened by the contract.

"The spirit and the letter of the Act require that an injured employee be left free and uninfluenced by the carrier in selecting the court in which to bring his action. The liableness to a judicial pronouncement of liability in any of the courts enumerated in section 6 of the Federal Employers' Liability Act is, itself, a 'liability' as that word is used in Section 5 of the Act. Hence so much of the contract as attempts to limit the courts in which plaintiff may bring his suit is void under Section 5 and should not be enforced."

The Utah Supreme Court quotes extensively and with approval from *Sherman v. Pere Marquette Ry. Co.*, 62 F. Supp. 590 (1945), decided by Judge Barnes, in the United

States District Court, Northern District of Illinois, Eastern Division, at Chicago.

In the *Sherman* case, the company advanced the injured employee, at his request, $200.00 per month for a period of nine months, a total of $1,800.00. At the time of receiving each payment, Sherman signed a contract similar to the contracts here, in which he agreed that he would sue only in the Circuit Court of Wayne County, Michigan, or in the Federal Court, at Detroit, Michigan.

Sherman filed suit in the Federal Court at Chicago and the Company moved to dismiss on the ground of improper venue, contending that proper venue was fixed by the agreement.

In addition, the Company set up facts similar to the allegations in the Complaint here tending to show how greatly it would be inconvenienced in getting its witnesses to Chicago and that it would be put to added expense in trying the case at Chicago.

In holding the agreements void, the Court said:

> "The comprehensive phraseology of Section 5 certainly includes within its meaning a contract the purpose or intent of which is to enable the common carrier to exempt itself from liability to suit for a violation of the act, 'in the district * * * in which the defendant shall be doing business at the time of commencing such action.' The beneficial effects of the statute should not be whittled away by the court by distinguishing between adjective and substantive rights and adjective and substantive duties or liabilities. Adjective rights and their correlative duties or liabilities are frequently as important as substantive rights, and substantive rights and their correlative duties or liabilities are of little value without adjective rights and their correlative duties or liabilities whereby the substantive rights may be enforced. It has been said that the word 'liability' in Section 5 is limited to the liability of the

carrier to respond in damages, but when we say that we beg the real question, which is as to the meaning of the word 'liability' in Section 5. It is said that venue is a privilege that may be waived, and that the case of *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437, lends support to this view. Generally speaking, venue is a privilege which may be waived, but it may not be contracted away in the face of a specific statute which prohibits such contracting, as does Section 5 of the Employers' Liability Act under consideration."

"The court is of the opinion that the contracts in question in this suit are void because they are prohibited by Section 5 of the Federal Employers' Liability Act.

"The court's attention has been called to the decisions in *Clark v. Lowden*, D. C. 48 F. Supp. 264, *Herrington v. Thompson*, 61 F. Supp. 903, filed in the Western District of Missouri, *Detwiler v. Lowden*, 198 Minn. 185, 269 N. W. 367, 838, 107 A. L. R. 1054, and *Peterson v. N. Y. Central R. Co.*, a decision without opinion by one of the judges of this court. These four decisions do support the contentions of the defendant and are worthy of great respect, but this court finds itself unable to follow them.

See also *Fleming v. Husted*, 68 F. Supp. 900, and *Krenger v. Penn. R. Co.*, 8 F. R. D. 65.

The *Krenger* case was affirmed by the United States Court of Appeals, Second Circuit, 174 F. (2nd) 556 (April 14, 1949).

In that case a contract, in substance, identical with the contracts in the case at bar was executed by Krenger upon the advancement to him for living expenses by the company of $250.00.

The majority opinion is written by Judge Clark with Judge Hand concurring in the result reached and Judge Swan dissenting.

The following language of Judge Clark seems pertinent in view of the argument we have made here (Page 559):

> Thus the railroad was contracting against its liability to be sued, i.e., to have its legal relations changed—adversely—in any one of the several jurisdictions, in order to obtain immunity from such change except under the favoring conditions of a single chosen jurisdiction. Hohfeld, Fundamental Legal Conceptions, 8, 50, 58-60, 1923, citing and quoting judicial usage; Corbin, Legal Analysis and Terminology, 29 Yale L. J. 163, 169, 170; 1 Restatement, Property Section 3, comment a and Special Note, 1936.
>
> Of course we should not press this overfar; in fact we need hardly have gone beyond the statutory background itself had not the judges sustaining these particular contracts relied, without other than an *ipse dixit*, upon some inherent circumscribed meaning necessarily to be attributed to the phrase. Once this is effectively challenged—indeed, once the compulsion thought to inhere in the word itself is dissipated—there is nothing left to restrict the broad sweep of the statute. And, indeed, any possibility that the statutory phrase could be limited to the duty to pay damages only would seem already foreclosed by *Duncan* v. *Thompson*, *supra*. That case, it will be recalled, held invalid an agreement requiring the repayment of sums advanced as a *condition precedent* to the bringing of action. If the statutory phrase applies to a condition requiring fulfillment *before* an action may be brought, it would seem just as applicable to a condition as to the *place where* action must be brought.
>
> I conclude that under the statute the contract relied on as a defense is invalid.

We shall not at this time discuss other cases in which the contracts have been held valid. These cases are cited in footnote 1, pages 3-7 above and are cited by the Michigan court in its opinion (R. 55).

The Court erred in holding that the contracts here are valid and legal and binding upon petitioner.

E.

The judgment of the lower State Court was correct and should be affirmed.

In passing the Federal Employers' Liability Act in 1908 and in strengthening it in 1910 by enacting the venue and jurisdictional provision in its present form, Congress intended to exercise its power under the commerce clause of the Constitution to its fullest extent.

The then current injustice which received the most studied notice in the report of the Committee in charge of the original bill was the one with which we are here concerned, the practice of the carriers to exempt themselves by contract or other device from liability in personal injury cases, whether the injuries resulted from the employer's negligence or from any other cause. This was removed by the broad language of Section 5.

The reason for this broad and complete exercise of power, and its purpose, are evidenced by the history of the legislature. Congress intended, insofar as it was possible, to remove preventable hazards from operative railroading, to abolish the injustices that were falling so heavily upon the railroad workers and to place the injured railroad man and his next-of-kin on an equal footing with his employer, in bargaining for settlements and in Court, if suit was brought. If Congress fell short of that purpose it could not have been from lack of power or from lack of intention to use all of the power it had. The trial court, therefore, reached the correct result.

For the reasons above given, the Supreme Court of Michigan erred in reversing instead of affirming the judgment of the Circuit Court of Calhoun County, Michigan; in entering a decree restoring the temporary injunction as

granted by the lower court and in remanding the cause for further proceedings.

Conclusion.

Petitioner therefore urges that the judgment of the Supreme Court of Michigan in all particulars be reversed and that the judgment of the Circuit Court of Calhoun County, Michigan be affirmed.

Respectfully submitted,

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APPENDIX

IN THE
SUPERIOR COURT OF COOK COUNTY, ILLINOIS.

Alexander Boyd, *Plaintiff*, vs. Grand Trunk Western Railroad Company, a corporation, *Defendant*.	No. 47 S 10416 Jury trial is demanded.

Complaint at Law.

The plaintiff, Alexander Boyd, by Edward B. Henslee, his attorney, says:

1. Defendant is a corporation organized and existing under and by virtue of the laws of the State of Michigan and under its charter is empowered to and does operate a system of railroad running through the States of Michigan and Illinois, as a common carrier by railroad of passengers and freight for hire, with one of its lines running into Chicago, Cook County, Illinois, where it maintains an office in charge of officers and agents upon whom service of progress may be had.

2. At the time of the accident and injury hereinafter complained of the plaintiff was a yard brakeman employed by the defendant in its Nichols Yard at or near Battle Creek, Michigan, and in his line of duty engaged in the switching of cars with interstate shipments therein, and by reason thereof plaintiff and defendant were engaged in interstate commerce and transportation and plaintiff's action herein arises under the Act of Congress of April 22, 1908, 35 Stat. 65, Chap. 149, with amendments thereto, com-

monly known as the Federal Employers' Liability Act, 45 U. S. C. A., Sections 51-59, and the Federal Safety Appliance and Equipment Act, 45 U. S. C. A., Sections 1-16, being an Act of Congress of March 2, 1893, Chapter 196, 27 Stat. 531, with amendments thereto to the present time.

3. At the time of, before and after the acts of negligence hereinafter set forth, the plaintiff was in the exercise of all due care and caution for his own safety.

4. On or about November 23, 1946, at approximately 7:30 P. M. the plaintiff was a yard brakeman and a member of a crew engaged in the making up and breaking up of trains and the switching of cars for the defendant at its Nichols Yard at or near Battle Creek, Michigan, and it became and was his duty in the interest of and in furtherance of the defendant's business to disconnect one car from a cut of about thirteen cars, and it then and there became and was the duty of the defendant to maintain its cars and equipment thereon and also to operate, control and manage its locomotive and cars so as not to injure the plaintiff rightfully along its lines of railroad.

5. The defendant disregarded its duty toward the plaintiff at the time and place set forth, in one or more of the following ways:

a) Defendant was careless and negligent in that it hauled or used along its lines a car which would not uncouple automatically, contrary to and in violation of the laws of the United States as set forth in 45 U. S. C. A., Chapter 1, Section 2 thereof.

b) Defendant was careless and negligent in the control, management and operation of its locomotive and cars.

c) Defendant was careless and negligent in not giving the plaintiff time to get onto the stirrup on one of its cars in order to disconnect another, contrary to and in violation of the usual method of doing this work.

d) Defendant was careless and negligent in not using ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work in that it allowed one of its ties to protrude above the ballast a distance of four to five inches at a much used and well traveled place on its premises.

e) Defendant was careless and negligent in not using ordinary care to reasonably light its premises so that its men in their line of duty could see the hazardous condition of the premises and protect themselves against stumbling over protruding ties at a much used and well traveled place along its lines of railroad.

6. As a direct and proximate result of one or more of the foregoing acts of negligence the plaintiff had to hurry to catch some cars which were being kicked and did not have time to get onto the stirrup of the car and when he tried the cutting lever to disconnect the car he found it to be disconnected and the unexpected giving of the cutting lever caused him to strike a protruding tie and threw him with great force and violence to and upon the ground and divers objects thereon, and by reason thereof he was caused to be so injured that divers bones of his body and back were dislocated, broken and compressed; divers membranes, muscles, ligaments, nerves and blood vessels of his body were sprained, torn, cut, bruised and injured; divers other organs of his body were displaced, bruised, torn, injured and their functions impaired; his brain and nervous system were greatly shocked, injured, and their functions impaired; he became sick, sore, lame and disabled from thence hitherto; he suffered great pain and anguish by reason of his said injuries, and will in the future continue to suffer therefrom; and by reason of his said injuries he expended and incurred great liability and indebtedness endeavoring to be cured of his injuries, and will in the future expend and incur considerable sums of money endeavoring to be cured of his injuries, and the plaintiff has

and will be unable to attend to his customary affairs and business, and he has and will be disabled for an indefinite time in the future, the exact time being unknown to the plaintiff at the present time.

To the damage of the plaintiff in the sum of One Hundred Thousand Dollars ($100,000.00) and therefor he brings this suit.

EDWARD B. HENSLEY,
Attorney for Plaintiff.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

I, HENRY SONNENSCHEIN Clerk of the Superior Court of Cook County, in and for the State of Illinois, and the keeper of the records, files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain complaint Filed in my office on the 25th day of June, A. D. 1947 a certain cause now pending in said Court on the law side thereof, wherein Alexander Boyd, Plaintiff, and Grand Trunk Western Railroad Co., a corp., defendant.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Chicago, this 20th day of December, A. D. 1948.

(SEAL) Henry Sonnenschein, Clerk.